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Relationship problems? Liability of employers for sexual relationships at work.

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Relationship Problems? Liability of Employers for Sexual Relationships at Work

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Abstract

Research has shown that sexual relationships at work are on the increase and the consequences for the parties (particularly employees and workers) can be the breakdown of working relationships, loss of employment and ultimately a legal claim. It is therefore an opportune time to review this important issue from a legal perspective. This issue has often been neglected in the past because of its sensitive and difficult nature and a general unwillingness to accept that it is an issue that can often have serious repercussions for victims of sex-related behaviour and therefore needs to be addressed from a legal perspective. Reference to the position in the United States will be made where it is useful in supporting the underlying arguments in the article. It will be argued that there is a need for employers to take this matter seriously and where appropriate make organisational changes to deal with it. A critical review of the legal rules that apply to relationships at work is also undertaken and where appropriate recommendations made for changes in the law.

Keywords: Workplace, Sexual, Relations, Legal, Remedies, Discrimination.

Introduction

The underlying causes of the growing phenomenon of sexual relations in the workplace are increased participation of women in the workplace and the development of a long-hours culture with the resultant increase in interaction between the sexes in the workplace. The following quote underpins that view: “The combination of a gender-mixed workforce and time spent at the workplace has the effect of conjuring up human emotions that often give birth to romance between co-workers and between subordinates and their supervisors. This may have significant consequences in the workplace” (Amaral, 2006).

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It is hardly surprising that sexual relationships in the workplace proliferate when it remains one of the best places where employees can find a sexual partner who shares their background, life goals and attitudes (Wilson, 2015). Personal relationships between workers or employees are perhaps an inescapable aspect of modern workplace relations but problems can result when these relationships break down, conflicts of interest arise (e.g. between the interests of the paramour and the employer) or sexual favouritism applies (Mainiero and Jones, 2013). Whatever the precise cause there is undoubtedly more instances of sexual behaviour at work nowadays and this is also due to a more relaxed attitude to workplace sexual relations as shown by the following research.

Research into Sexual Relationships in the Workplace

To date very little has been written about legal liability of employers for sexual relationships at work in the UK (Middlemiss, 2008; Schultz, 2003; Hallinan, 1992) although considerable research has been undertaken into the managerial and sociological aspects of sexual relationships in the workplace (e.g. Biggs et al, 2012; Pierce et al, 2012; Kolesnikova and Analoui, 2012).

Unfortunately, there has not been much research undertaken into the disciplinary or legal aspects of this topic. It is important to consider the research that has been carried out into the phenomenon of sex in the workplace. An example of research into workplace sexual relations was a recent survey undertaken by Business Insider (Blodget, 2013). This revealed that most people were willing to have sex with someone in their workplace if the opportunity arose. Of the 2,500 respondents in the study around 85% believed that colleagues (employed in the same organisation) should be allowed to have sex. Also, almost all the respondents held the view that human resources department should not be informed of the fact that certain employees are having sex with each other. Over fifty percent of the respondents (54%) admitted to having sex with a colleague. This is a significant number which should raise concerns for employers. Likewise, around 14% (around 1 in 8) respondents said they had entered into sexual relations with their boss. These findings illustrate that sexual relationships at work are commonplace and are generally regarded as non-problematic. There is an age aspect to this as younger people have shown themselves more open to sexual relations at work than older workers as illustrated by the results of a research survey carried out recently by Workplace Options (Workplaceoptions, 2017). The researchers found that nearly 85% of the 18-29-year-olds surveyed reported they would have a romantic relationship with a co-worker. Forty per cent of the respondents in that age group also said they would date their supervisors. While this is only one survey it does identify a significant development, namely that younger workers can be particularly open to enter a romantic relationship with a colleague or their boss. What recent research has also shown is that younger workers are more likely to be sexually harassed than older workers. In one of the largest surveys undertaken in the UK into sexual



harassment around 6,000 UK adults were questioned about their attitude towards sexual harassment in the workplace (BBC, 2018). An important finding was that women aged 18-34 were most at risk of sexual harassment at work, with 43% reporting they had experienced it. This is a high figure compared with the results for 30-46-year-olds where just over 35% said they would have a romantic relationship with a co-worker and 30% of the 47-66-year-old age group said the same. This is an aspect of this problem that employers should be cognisant of and consider addressing in their managerial response to this issue. Research undertaken in the United States (US) produced some interesting results concerning the practical approach of management to this issue. In 2005, the Society for Human Resource Management (SHRM) and the Wall Street Journal conducted a poll of HR professionals and employees on several workplace romance issues (Parks, 2006). The survey also involved comparison with the results of a similar survey that had been conducted by them in 2001. It found that in both years over 70% of firms did not have a formal written or verbal policy addressing workplace romance. Of those that did, the majority permitted dating but discouraged it. Only 9% of the employers prohibited dating. These results indicate a general unwillingness amongst employers in the US to formally address this issue. However, the majority HR professionals surveyed were concerned with the likelihood of legal action. The research undertaken in 2001 found that 95% of HR professionals believed that fear of sexual harassment claims was a reason to discourage romance in the workplace. The percentage dropped to 77% in 2005. However, concerns about conflicts between co-workers whose relationships ended grew from 12% to 67% over the four-year period. Many employees (52%) felt that the consequences for violating a dating policy should be a formal reprimand. Only 11% felt that termination was appropriate

In 2017, an assistant professor of psychology at the University of Tulsa, Amy Salvaggio, conducted a study of nearly 200 full-time workers in a variety of workplaces and her findings indicated that most respondents did not mind seeing a romance develop between two unmarried colleagues. However, they did have a problem with workplace relationships where one or both parties were married, or the relationship was between a supervisor and a subordinate. The survey found that employees regarded workplace romances as producing more risks than benefits. The risks identified were decline in work performance, damage to careers and a loss of respect and credibility (Society for Industrial and Organizational Psychology, 2017).

While this research outlines the attitudes of the parties involved in workplace romances it unfortunately does not analyse the disciplinary aspects or legal impact of the behaviour on the employment relationship and this would seem an important and fruitful area for future research. What follows is analysis of an important aspect of this problem namely, on-line sexual relationships.

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On-Line Relationships at Work

It is now recognised that technological changes such as e-mail social networking sites and organisational intranets have led to increased opportunities for sexual relationships to start at work particularly, between managers and employees. One commentator in the US (Baldas, 2009) advised employers not to tolerate romances between employers at work on the basis that it could lead to legal claims including, harassment, discrimination or wrongful termination. The same commentator also recommended that employers recognise this type of behaviour and deal with it as it can often result in accusations of favouritism. This can particularly be the case when a manager befriends only a few select subordinates on social networking sites e.g. Facebook[®] or LinkedIn[®] (Baldas, 2009; Mainiero and Jones, 2013).

One potential way for an employer to handle these issues is to agree a policy with employees or workers that clarifies what is expected of them online. Having such a policy however can potentially lead to questions concerning its practical enforceability. It also raises human rights considerations namely to what extent an employer can legitimately exert control or influence over an employee's private life. Interestingly, a major employer in the UK, Her Majesty's Revenue and Customs (HMRC), did not deal with the issue of relationships between managers and employees in its guidance on the use of social media because it did not believe it was an issue that specifically needed to be addressed (HMRC, 2010). Acas (2011) in their guidance on the use of social networking which has been in place since January 2011 also did not address this issue directly on the basis that there have not been many problems relating to online relationships between colleagues or between employees and managers. An interesting aspect of this is that from an evidential viewpoint, IT developments might mean employees will struggle to conceal a workplace romance. Most employees nowadays carry a mobile phone with video and audio recording capability so persons carrying out an affair in the workplace can more easily be discovered and recorded. The following quote from commentators in the US summaries the challenges that face employers in the digital age: "textual harassment sending offensive or inappropriate text messages to co-workers is on the rise. Contemporary social media technologies ... carry numerous risks associated with personal and professional connectivity, privacy, and intimacy, and these risks require a new look at policy formulation concerning the boundaries of workplace romance versus harassment in the internet age" (Mainiero and Jones, 2013: 187).

Dealing with online relationships at work can prove difficult for an employer and evidence of an online liaison or its aftermath might be available in the event of a legal claim arising. What follows is the current basis for legal claims in the UK.



Legal Position

In the UK employers can try to restrict or ban relationships in the workplace through the employment contract or in disciplinary procedures in order to protect the company from sexual harassment claims etc. Some employers in the UK have followed the lead of employers in the US who often utilise anti-fraternisation policies or love contracts to regulate workplace relations. An employer may face employment claims brought by parties in a relationship, especially where a relationship has deteriorated or broken down and has not been resolved amicably. In serious cases of harassment or bullying there may also be a possible claim for harassment under the Protection from Harassment Act 1997. The alternative avenues for legal redress will be considered later. First, the potential liability of employers in this context for claims of sexual harassment and sex discrimination under section 109 of the Equality Act 2010 will be discussed.

Sexual Harassment

If the romantic relationship at work is between a manager and a worker or between co-workers, the prevailing legal remedy for the victim is a claim for sexual harassment under section 26 of the Equality Act 2010. This can arise when a sexual relationship at work is discontinued but one of the parties tries to continue it against the other's wishes. The conduct at this point becomes unwelcome and unlawful. Employers often have to make difficult decisions in order to deal with the situation appropriately while minimising the potential risks to their business. The following quote identifies the possible consequences for an employer where things go wrong in this context. "It is important that the employer protects its interests. The employer has a business interest in maintaining morale and productivity. The employer also has a legal interest in avoiding any and all forms of sexual harassment claims. Both the business and legal interests have the potential of affecting the employer's reputation in the community and its profitability" (Amaral, 2006: 5).

An employee could pursue a harassment claim against both his employer and the harasser under section 110 of the Equality Act. An example involved the unreported case of Joanne Clay who worked for the Port Vale Football Club from 2011 until October 2014 when she was dismissed from her position as sales event manager because of allegations that she had been having an affair with Marc Richards a former footballer at the club which was contrary to the club rules (Redmans Solicitors, 2015). Ms Clay stated in her evidence to the Employment Tribunal that she had not had an affair with Mr Richards but rumours of an affair had circulated after Mr Richards had written his name on her car, followed her to the bank and persuaded her to give him her home address. Ms Clay was then told that she was going to be subjected to a disciplinary hearing on the basis that she had flouted club rules by having a relationship with one of the players, despite her denial of an



affair. She was subsequently dismissed from her position for gross misconduct. The Employment Tribunal ruled in Ms Clay's favour in her claims for sex discrimination and sexual harassment. The judgment of the Tribunal stated that a man would not have been dismissed in the same position (Simpson, 2015). The case went on appeal and the employment appeal court upheld the tribunal decision and an undisclosed settlement was reached (Vernon v Azure Support Services Ltd & Ors UKEAT/0192/13/SM).

Liability of Employers for Sexual Harassment by Managers

In many cases of sexual harassment, the harasser is the manager or supervisor of the victim. In the case of Timothy James Consulting v Wilton UKEAT/0082/14/DXA several incidents had occurred that involved conflict and tensions between the claimant and a director with whom she had previously had a personal relationship. Amongst other things, the claimant was subjected to a tirade of criticism and described as a green-eyed monster. This comment related to the alleged jealousy of the claimant of another female colleague with whom her manager and ex-lover Mr O'Connell had formed a relationship. The employment tribunal concluded that the treatment afforded to the claimant was because she had previously had a relationship with Mr O'Connell and was therefore related to the protected characteristic of sex as defined in section 11 of the Equality Act 2010. The employment tribunal also found that there had been three incidents of sexual harassment. In the end the claimant had resigned and claimed constructive dismissal. The employment tribunal had found that the constructive dismissal was, in itself, an act of harassment under the Equality Act 2010. Interestingly, the Employment Appeal Tribunal (EAT) disagreed on this point. They held that on a correct interpretation of the Equality Act an act of constructive dismissal does not fall within the meaning of harassment. Under section 26 (1) of the Act: A person (A) harasses another (B) if (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. Under subsection (4), in deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account: (a) the perception of B, (b) the other circumstances of the case and, (c) whether it is reasonable for the conduct to have that effect. The employment tribunal made an order of £10,000 for injury to feelings for the incidents of harassment that had occurred. This decision highlights the potential problems that can arise when a workplace romance has finished but the parties involved continue to work alongside each other.

In Marks v Derbyshire Healthcare NHS Foundation Trust ET/2603606/2013 & ET/2600717/2014 an employment tribunal held that Mrs Marks a HR director in the NHS was constructively dismissed and subjected to sex discrimination after rejecting the sexual advances of



the trust's chairman. A pattern of bullying (including sending her sexist texts and offensive e-mails) followed what was a very friendly relationship between the victim Mrs Marx and her harasser and boss Mr Baines. It was when he wanted to start a sexual relationship with her, and she made it clear she wasn't interested, that things went seriously wrong. The victim was awarded £832,711 compensation following an employment tribunal case in which she successfully claimed unfair dismissal, sex discrimination, harassment and victimisation.

These cases illustrate that employers can face serious repercussions when they are found liable in this context for the behaviour of their supervisory employees.

When an individual employee gets preferential treatment because of her relationship with someone more senior it is known as sexual favouritism. If another employee feels aggrieved by this and it results in them leaving their employment there could bring a claim for constructive dismissal or discrimination. The legal rules dealing with sexual favouritism have been touched upon here but will be considered more fully later in the article. What follows is a consideration of the liability of employers for relationships between employees who are colleagues.

Liability of employers for sexual harassment arising from relationships between colleagues

Having dealt with relationships between managers and their subordinates it is now necessary to consider the legal position when colleagues of a similar standing in employment have a relationship and things go wrong leading to a claim for harassment. With respect to sexual harassment this occurs when one employee engages in unwanted conduct of a sexual nature which has the purpose or effect either of violating another employee's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for that employee. The sort of behaviour which might be classified as sexual harassment following the breakdown of a relationship could include: sending offensive or threatening emails or unwanted presents, making jokes or remarks of a sexual nature, following, stalking or inappropriate touching. Under French law it protects employees' private lives (French Data Protection Act: 2018). This means an employer would be unlikely to restrict a workplace romance as it could be regarded as an interference in an employee's personal life and could be deemed as a breach of their right to privacy. Employees cannot be forced to disclose their personal relationships, much less be prevented from engaging in them, even if they're work-related.

An employer is generally vicariously liable for the actions of its employees in the course of employment and so if a member of staff is found to have harassed a colleague the employer will be held responsible. There can be particular problems when the relationship involves colleagues



from the same team and the relationship breaks up acrimoniously. The claims for sexual harassment can result from unwanted advances made to an employee by another employee after the relationship between them has ended. Therefore when an individual employee or worker makes a complaint of harassment in this context his or her employer must take steps to investigate the matter. This might include ensuring that while the matter is under investigation the employee making the complaint is not subjected to any further alleged harassment. A solution to this is often that one of the parties involved being transferred to a different part of the organisation. It is not generally viewed as good practice to move the complainant and so it is usually the alleged harasser that is moved.

The only basis on which an employer can defend a claim of sexual harassment under section 109 of the UK Equality Act is to show that it took all reasonable steps to prevent the harassment from occurring. The reasonable steps could include: having a sexual harassment policy or a specific policy dealing with sexual relations and conducting regular training on the policy e.g. providing employees with the skills needed to avoid or effectively deal with complaints of unlawful sexual harassment and clearly communicating and fairly and consistently operating policies. In *Canniffe v East Riding of Yorkshire Council* (2000) IRLR 555 the EAT held that introduction of a sexual harassment policy to the workplace by the employer was an insufficient step for them to escape liability.

Sexual Favouritism

The scale of sexual favouritism in the UK is currently unknown as this is not a recognised form of sex discrimination so no official data exists concerning the scale of the problem. Currently in the UK employers have no legal duty to prohibit sexual favouritism in the workplace. The result is that managers and supervisors that perpetrate this behaviour can reward staff in a tangible way (e.g. promotion) when they agree to have sexual relations with them without facing the prospect of a legal challenge. This part of the article will consider the legal position of employees in the UK who have refused or have not been asked to enter into sexual relations with a person in authority and have lost out in comparison with employees that have been asked and agreed. The former type of employee are often not entitled to employment benefits (e.g. promotion, enhanced salary) that are extended to employees who are willing to have a sexual relationship with their supervisor. Those disentitled people will be referred to hereafter as the victims of sexual favouritism. On strict application of the Equality Act 2010 women who are disadvantaged by this behaviour would have a restricted right of action on the characteristic of sex. This is because they would struggle to establish that the sexual discrimination is based on the gender of the victim unless the employee who has entered into a relationship with the boss is male. It is also questionable whether an action



would lie under the sexual orientation provisions under section 12 of the Equality Act 2010. However, the potential for an action is there when, for example, the person in authority is a heterosexual male and his sexual partner and the victim are both female but the latter is a lesbian, since it could be argued she would not be in a position because of her sexual orientation to have sex with the boss and benefit accordingly.

What is the position of males who are disadvantaged because they cannot for the same reason obtain the employment benefits that a female employee that enters into a sexual relationship with her superior gets? When the person in authority is a heterosexual male, he is only likely to have a relationship with a female employee. Male employees will clearly not be eligible for the benefits arising from that kind of relationship. On the face of it this is direct discrimination against male employees on the basis that “but for their sex” they would not have been disadvantaged. Of course, the employer in a discrimination claim brought by a male victim can argue in his defense that as not all female employees benefit from the manager's sexual attentions and both male and female victims suffer the same disadvantage it is gender neutral (US courts position). A more practical remedy for males affected by sexual favoritism would be to claim indirect discrimination on the ground of sex on the basis that considerably less men than women can have consensual sexual relations with a heterosexual male manager and qualify for the resultant employment benefits and it is therefore to their disadvantage. This commentator is not aware of any cases being brought on this basis to date.

Where a sexual harassment claim is brought by a male or female victim concerning sexual favoritism under section 26 of the Equality Act there is no need for a comparator as it is sufficient for the victim in harassment claims to show that the behaviour was unwanted and was of a sexual nature which had the purpose or effect either of violating their dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

The EEOC guidelines No. N-915-050, 3/19/90 in the US suggest a cause of action based on sexual favoritism should lie under the Civil Rights Act: "Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit" (Miller v. Aluminium Co. of America, 679 F. Supp. 495). The example given in the guidelines is that where a supervisor may have been interested in only one woman and, thus, have coerced only her, both women and men who were qualified for but were denied the benefit would have standing to challenge the favoritism on the basis that they were injured as a result of the discrimination levelled



against the woman who was coerced. While the basis for a claim might seem somewhat spurious the EEOC believes it is clearly a possibility.

What about female employees who are similarly situated to men in this context? While males might be able to claim sex discrimination their female counterparts cannot because there is no precedent for claiming same sex (heterosexual) discrimination in the UK. There is also the possibility of bringing a harassment case under section 26 of the Equality Act 2010 when it is perpetrated because of the characteristic of; age, race, disability, sexual orientation or religion or belief.

Whether the applicant can establish they suffered sufficient disadvantage will be a key consideration here. Does sexual favouritism create a sufficiently hostile or unwelcome working environment? The detriment could be reinforced where an additional ground of discrimination can be shown to apply. There is a dearth of legal cases dealing with this issue in the UK and inherent obstacles to pursuance of remedies by victims of sexual favouritism under statute law. It is therefore useful to consider the legal treatment of this issue in the USA and compare it with the position in the UK. At the present time in the UK courts and employment tribunals would normally regard sexual relations at work as a mutually agreed relationship between two consenting adults and unless serious doubt can be cast on this (by showing undue influence, coercion or force, etc.) they are unlikely to intervene.

The EEOC's 1999 Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism provides: "If favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors." When a male employee in a supervisory position enters into a sexual relationship with one of his female staff and the relationship breaks down, leading directly to her dismissal from her job, she might be able to successfully claim unfair dismissal, where the dismissal is for an unfair reason or is procedurally incorrect. She might not however, be able to successfully claim for sex discrimination. In this commentator's view there is an urgent need for primary research to be undertaken to determine the incidence of sexual favouritism in the UK and whether legal intervention is necessary.

Unfair Dismissal

Employers could face a constructive dismissal claim from an employee where they fail to address and handle the problem of sexual relationships gone awry appropriately as this could



represent a breach of the employee's trust and confidence which often forms the basis for such a claim. Therefore, where a sexual relationship breaks down and the actions of an aggrieved employee (such as post-relationship bullying) result in the victim resigning, there would be grounds for an action of constructive dismissal if the employer knew of this and failed to take any action. Further, where an employee is dismissed because he or she has entered into a sexual relationship with a colleague, and this was not contrary to any contractual requirement of the employer, then this could be unfair dismissal. A case in point is *St James Management Services Ltd v Power* 2011 WL 1151920. The facts were that the claimant and the managing director (MD) of the business had a sexual relationship. She was later made redundant by the MD on the basis that the business had to cut costs. The tribunal found that the claimant's selection for redundancy was unfair, as she had been given insufficient financial data to enable her to put forward alternative cost-saving proposals, received no warning of a meeting to discuss her redundancy and had not been adequately consulted. The respondent maintained that the failures were merely procedural, and she would have been dismissed in any event. However, the tribunal found that the MD's arbitrary decision to dismiss her was because of his embarrassment about his past relationship with her. The employer appealed against the employment tribunal's decision that the respondent, former employee Power, had been unfairly dismissed. However, the appeal was dismissed by the EAT. They agreed that some of the matters cited by the tribunal in support of its decision were concerned with procedural defects but that they were all issues that went to the fairness of the procedure. More significantly, the manager director's arbitrary decision to dismiss the claimant went to the substantive issue of unfairness. It was the prior sexual relationship between him and her that was the basis of his decision-making.

In *Phoenix House Ltd v Stockman & Amor* UKEAT/0264/15/DM an employee was dismissed on grounds that the relationship between her and her employer had broken down irretrievably. Her employer argued that this meant she was dismissed for 'some other substantial reason' and her dismissal was therefore fair. She claimed that the relationship had not irretrievably broken down and suggested ways in which she could continue to work with her colleagues. The EAT agreed that an objective reasonable employer would not have concluded that the employment relationship was beyond repair to the extent that dismissal was a reasonable option. Particularly, the EAT found that she had not been given the chance to show that she could work harmoniously with her colleagues. Notably, it also found that the ACAS Code of Practice on Disciplinary and Grievance Procedures did not apply to dismissals for 'some other substantial reason' following a breakdown in working relationships.

An interesting case is *GM Packaging UK Ltd. v Haslem* UKEAT/0259/13/LA where the Employment Appeal Tribunal had to decide whether employees having sex in the workplace was



gross misconduct. The employment tribunal that heard the original case decided it wasn't. The EAT was sympathetic to the employees, but they still cut the damages awarded in half for contributory fault. They concluded that the employer's decision to dismiss the two employees caught in flagrante delicto was unreasonable and the claimants won their claims for unfair dismissal. The employer appealed this decision and the EAT reversed it and held that the dismissals were fair. A key factor in their decision was that the employees had not only been having sex but had also been making rude comments about their boss while doing so. What is not clear is whether the EAT would have agreed with the tribunal and decided the dismissal was fair in circumstances where no negative comments about the boss accompanied the employees' sexual behaviour at work. Another issue arose in this case namely, was it fair for an employer to dismiss an employee on the recommendation of an external HR consultant? Following an investigation, the HR consultant recommended dismissal and the managing director accepted this recommendation. When the Claimant appealed, this was also delegated to a HR consultant and the appeal was rejected. The employment tribunal held in this case it was fair and reasonable to delegate matters to a HR consultant. It is often the case that unfair dismissal is claimed along with a discrimination or harassment claim as illustrated by various cases referred to earlier. What follows is a brief consideration of the applicability of the civil provisions in the Protection from Harassment Act 1997.

Protection from Harassment Act 1997

Under the Protection from Harassment Act victims of harassment at work can claim damages under the civil law for behaviour which has caused or may cause distress under section 3 in England and Wales and section 8 in Scotland. As will be seen the possibility of a claim under the Act for issues arising from sexual relationships at work could be limited given the nature of the legal rules. Historically the Act was used against stalkers however in *Majrowski v Guys & St Thomas's NHS Trust* (2006) UKHL 34 a civil claim was successfully brought under the Act against an employer. Mr Majrowski claimed that he had been harassed at work by his line manager and the House of Lords ruled that the employer was vicariously liable for the behaviour of the manager who harassed him. Following this case employees could bring harassment claims where they had suffered alarm, anxiety or distress even where there was no allegation of discrimination or psychiatric injury. The Act prohibits a course of conduct that amounts to harassment of another on at least two occasions although there can be a reasonable gap between the incidents of harassment.

The Court of Appeal in *Sunderland City Council v Conn* (2008} IRLR 324 CA explained that "the touchstone for recognising what is harassment ... will be whether the conduct is of such gravity



as to justify the sanctions of the criminal law.” The correctness of this view was challenged by Lord Uist in the Inner House of the Court of Session in *Marinello v Edinburgh District Council* (2010) CSOH 17 at paragraph 30. In *Conn*, the Court of Appeal overturned a judge’s finding of harassment under the Act. The claimant had based his claim on two incidents of alleged harassment at work. Although the court was satisfied that one of the incidents was serious enough to amount to harassment the other was not so serious and so there was no course of conduct as required by the Act (sections 1 and 7(3)).

A claim will only lie when an individual can establish that they suffered injury as a result of a course of conduct where the treatment suffered amounts to criminal misconduct under the Protection from Harassment Act. Civil harassment is unlawful under sections 1 and 4 of the Act however there is no criminal offence under the Act in Scotland. However, a positive aspect of bringing a claim under the Act is that employers are subject to strict vicarious liability to which there will be no defence. A claim based on breach of statutory duty under the Act does not require reasonable foreseeability of the claimant’s injury to be shown, whereas a claim of negligence does, making a negligence claim harder to prove. Now that *Majrowski* has established that the Act can give rise to vicarious liability on the part of an employer for acts of his employees, more potential claimants are likely to consider that they have a reasonable chance of success in a civil claim.

The course of conduct that courts have regarded as civil harassment under the Protection from Harassment Act was illustrated in the case of *Iqbal v Manson* (2008) IRLR 324 CA p 324. A civil claim in harassment was brought by Mr Iqbal a solicitor-advocate, against a small firm of solicitors who used to employ him. The complaint arose from a series of three letters which contained allegations about C’s professional and personal integrity. Amongst other things, the letters alleged that the employee had been summarily dismissed due to his insubordination and reckless conduct, had misled the Law Society and was using clients to settle a vendetta against his employer. The employer made further allegations against Mr Iqbal including bigamy and immigration fraud. The Court of Appeal decided that even if the first two letters had not amounted to harassment a course of conduct could be established by considering all three letters together. They arguably evidenced a campaign of harassment which was capable of causing Mr Iqbal alarm and distress. This decision seems to be at odds with the Court of Appeal decision in *Conn* but does offer some hope to victims of harassment arising from sexual relations at work where the behaviour complained of may involve a course of conduct that include less serious aspects.

The Protection from Harassment Act allows a six-year period for bringing claims (five years in Scotland) which contrasts with the three-year period for personal injury claims and the three-



month period for the majority of employment law claims. What follows is a brief consideration of the human rights aspects of this problem.

Privacy and sexual relations at work

The Human Rights Act 1998 requires courts and tribunals in the UK in dealing with employment law cases to have regard to an applicant's rights under the European Convention on Human Rights (ECHR). In the present context the most relevant of these is Article 8 of the ECHR which recognises a right for everyone to a private life. It states that: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. Under section 8(2) it states that there shall be no interference by a public authority with the exercise of this right, except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. The Article 8 right to respect for private and family life could arise in the context of an employer enforcing rules controlling workplace relationships or claims by employees of sexual harassment or sexual favouritism. They could also arise when a tribunal is considering the reasonableness of a dismissal. Under s98 of the Employment Rights Act 1996 the tribunal has to consider whether the employer acted reasonably or unreasonably in all the circumstances. This could include consideration of whether Article 8 of the convention is engaged (Clarke, 2006).

There is a very fine line between regulating workplace romances and invading employees' privacy, see for example *Niemietz v Germany* App. No. 13710/88, Judgment of 16 December 1992.

Managers generally enjoy the prerogative to introduce rules and regulations restricting or excluding dating at work but this must be weighed against the privacy rights of their employees. It seems likely that a non-fraternisation policy for example, requiring employees to disclose close personal relationships would engage Article 8 and it might be difficult for an employer to justify it under Article 8 (2).

Legal Position in the US

The federal courts have accepted for around thirty years that where there is widespread sexual favouritism in the workplace which adversely affects a worker's working environment a claim can be successful. The position in an isolated case of sexual favouritism is much less clear. In *Priest v. Rotary* 634 F. Supp. 571 (N.D. Cal. (1986) a waitress's brought a Title VII action against her employer for sexual harassment. The plaintiff claimed that her manager was engaged in a



consensual sexual relationship with another waitress and this relationship had advantaged that other waitress and disadvantaged her. She specifically alleged that the other waitress was given better work assignments, extended preferential vacation benefits, excused from certain duties and otherwise exempted from certain workplace rules. She also claimed that her manager engaged in behaviour which made the workplace environment offensive and intimidating. The court decided that Title VII was violated when an employer afforded preferential treatment to female employees who submitted to his sexual advances or other conduct of a sexual nature, or when, by his conduct or statements, implied that job benefits would be conditioned on an employee's good-natured endurance of his sexually-charged conduct or sexual advances. The court held that the plaintiff had established a violation of Title VII by showing that her manager's consensual sexual partner and others who had tolerated his conduct had been given preferential treatment. By contrast, the US Court of Appeals for the Second Circuit held in *DeCintio v. Westchester County Medical Center* 807 F.2d 304 (2d Cir. 1986) was one of the earliest cases to raise a paramour favoritism claim under Title VII, that the seven male plaintiffs in the case were not prejudiced on the basis of sex when a supervisor promoted his paramour under the pretext that she was the only employee who qualified for the higher position due to a particular certification. The court recognized that although such practice was unfair, it did not rise to the level of discrimination prohibited by Title VII. In the US where the supervisor is a serial seducer of female staff then the employer can be liable for sexual harassment at least. This arises where a third party (e.g. another employee that is not involved in the sexual relationship) can demonstrate widespread sexual favouritism that is so extreme and undesirable as to alter the employees' working conditions and create a hostile work environment for them. However, in California the legal liability of perpetrators of sexual favouritism has been expanded considerably. In the leading case of *Miller v. Department of Corrections* 115 P.3d 77 (Cal. 2005) the California Supreme Court held that widespread sexual favouritism in the workplace may create an actionable hostile environment claim by demonstrating that sexual favouritism was severe or pervasive enough to alter an employee's working conditions. However, the court in *Miller* made it clear that a single act of preferential treatment arising out of a consensual sexual relationship would not be unlawful sexual harassment. Therefore, workers who lose promotions to colleagues who are sleeping with the boss can sue their employers for sexual harassment, the Californian Supreme Court ruled. In a significant expansion of sexual harassment law in California, the state high court unanimously decided that any worker, male or female, could suffer sexual harassment even if his or her boss never asked for sexual favours or made inappropriate advances. Previously, only the worker who had the affair or received unwanted sexual attention could succeed in an action in California. The impact of the decision is that in



California at least, male as well as female employees can sue when their boss is exercising favouritism to employees who are their sexual partners.

The US Equal Employment Opportunity Commission (EEOC, 1999) have stated that “not all types of sexual favouritism violate Title VII ... Title VII does not prohibit preferential treatment based upon consensual romantic relationships ... it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their gender.” Policy Guidance on employer liability under Title VII for sexual Favoritism available at www.eeoc.gov/policy/docs/sexualfavor.html. The EEOC guidance explains that an isolated instance of favoritism toward a paramour may be unfair, but it does not discriminate against women or men in violation of Title VII because, both are disadvantaged for reasons other than their gender. In *Sherk v. Adesa Atlanta LLC*, 432 F. Supp.2d 1358, 1373 (N.D. Ga. 2006) the US District Court for the Northern District of Georgia held that an employer was not liable for retaliation under Title VII in a claim by a female employee after she was allegedly fired for complaining about a male supervisor giving preferential treatment to an employee who was in a sexual relationship with him. The court held for the employer because the employee could not reasonably believe that such a practice violated Title VII given established court precedent. A similar conclusion was reached in *Wilson v. Delta State University* No. 04-60759 (5th Cir. Aug. 12, 2005) it was held that a university was not liable for failing to renew a male’s employment contract due to alleged retaliation for the employee’s complaint about a female co-worker receiving a promotion because of her affair with the university vice president. For the same reasons as the Georgia District Court, the Fifth Circuit held that settled law establishes that such paramour favoritism does not violate Title VII and, therefore, the employee could not reasonably believe that such a practice warranted a complaint.

The following quote is from a US commentator that strongly believes the sexual favoritism is so similar to sexual harassment that it should be similarly protected under the law. “I argue that regardless of the perspective from which one views it, the theoretical bases for sexual favoritism and sexual harassment claims are so similar that preferential treatment in the workplace based on sexual favoritism should be actionable under Title VII as a form of employment discrimination (Van Tol, 2017).

It could be reasonably argued that the US courts are generally more amenable to providing remedies to victims of sexual favouritism than the judiciary in the UK particularly where there is a collective element to the case.



Management Response

The appropriate response of management to sexual relationships has been discussed already in the context of defending a claim of vicarious liability under the equality legislation. However, what follows is a more detailed consideration of the approaches management can take (Sutherland, 2013).

In America, employers often use love (or non-fraternisation) contracts to regulate workplace affairs. This is a contract that both parties sign to confirm they have entered into a workplace relationship voluntarily. The reason for doing this is that it will prevent either party from claiming sexual harassment when things do not work out.

These have not been utilised by most employers in the UK. This is mainly because these contracts would not be effective in the UK because employees cannot waive their right to be protected against sexual harassment (Wilkie, 2013). Another obstacle is that the contract would only apply during the relationship and there would be nothing to stop either party claiming sexual harassment when the relationship had ended. The following quote highlights the difficulty with managing this type of behaviour: “workplace romance and sexual harassment are pervasive social-sexual phenomena in organizations. However, the processes through which dissolved workplace romances are most likely to foster sexually harassing behaviour between former romantic partners are not known” (Pierce, Aguinis: 2001). The authors of the article propose that the following factors play a critical role in influencing the likelihood that terminated workplace romances lead to sexually harassing behaviour: (a) type of workplace romance as defined by pairing of each partner’s primary romance motive (b) partners’ social power (c) initiation of romantic relationship dissolution (d) male partner’s sexual harassment proclivity (e) nature of each partner’s residual affective state and (f) organization’s tolerance for sexual harassment.

Regarding the measures that employers can take to minimise the risk of tribunal claims as discussed earlier a fundamental one is ensuring they have codes of conduct, equal opportunities and anti-harassment policies in place. These should identify the type of behaviour that is, and is not, tolerated in this context in the workplace. Policies should also set out how the company will deal with workplace relationships so that everyone is clear. There is no one size fits all answer, so employers must apply their policies on a case-by-case basis while adopting a consistent approach to managing the existence of a relationship including, where necessary taking disciplinary action to deal with inappropriate behaviour in the workplace. The policies should cover the behaviour of employees or workers but, also that of contractors, suppliers, manufacturers, clients etc.



However, the existence of policies alone is unlikely to be sufficient and employers must provide appropriate training to all staff to avoid any confusion as to how the employer will manage the existence of a relationship. Workplace mediation is another possible option which often involves a neutral third party identifying the issues of concern and helping the parties to move forward. Whether this would be a suitable to both parties which is usually required is questionable particularly when emotions are running high. Internal mediation can be very useful if acceptable to the parties. Where an independent professional is required, ACAS can carry out the mediation and provide formal recommendations and put in place an agreement.

In the US, the Society for Human Resource Management undertook research of its members into, amongst other things, how their members dealt with sexual relations at work. They canvassed 380 HR professionals in 2013 and found that 42 percent of the respondents had a policy covering workplace romance. There were various responses taken by Human Resource Managers to breaches of company rules. “Respondents said that in the past five years, they’ve resorted to one or more of these consequences: transfer one employee to a different department (34 percent); send the couple to relationship counselling (32 percent); draw up a formal reprimand (21 percent); fire the offending workers (20 percent); remove a worker from a supervisory position (12 percent); suspend the employees (8 percent)” (Society for Human Resource Management, 2017). Some of these responses might seem somewhat draconian and might lead to legal claims of unfair dismissal or breach of contract against the employer if they were adopted in the UK.

Conclusion

The issues surrounding workplace relationships are summarised neatly in the following quote: “In today's work-oriented culture, office romances and the related topics of sex and privacy have become important issues confronted by most employers. With more employees working longer days and spending so much of their time on-the-job, romantic relationships at work are developing more frequently. Workplace romance may be the only option for employees whose workload limits their outside activities; but for employers, this trend may prove problematic as the potential liability associated with these relationships rises” (Wilson et al, 2003). Recent research has shown that workplace relationships are prevalent and that employers struggle to deal with the problem effectively. The following are some interesting statistics from a survey undertaken with employers and employees in the UK which was carried out by XpertHR and RP Cushing Recruitment: 1 in 3 employers have prohibited relationships between managers and subordinates; 1 in 6 employers have prohibited relationships between employees and customers; 1 in 7 employers have prohibited relationships between employees in the same team and most significantly 1 in 10 workers have engaged in sexual activity in the office (Thomas, 2005). The evidence does point to the fact that



some employers are trying to control relationships at work. Relative and Relationship policies which state any relationships or family connections should be declared, particularly in situations where one reports to another can be used or a Personal Relationships at Work Policy. Relative and Relationship policies which state any relationships or family connections should be declared, particularly in situations where one reports to another can be used or a Personal Relationships at Work Policy. The following quote encapsulates the difficulty for employers: “...while employers dislike in-house affairs because they tend to get messy, the desire to manage personal relationships for the good of the business is incredibly complex, both legally and ethically” (Helen Farr, cited in Matthews, 2014).

What the foregoing analysis has shown is that the law in both the UK and the US is somewhat lacking in its coverage and accessibility for employees that are victims of unacceptable behaviour of employers in this context. It is not unreasonable to recognise the difficulty that employers face in handling these cases but it is this author’s view that it is vital employees or workers that are victims of sexual favouritism (both male and female) or post relationship discrimination or unfair dismissal have their legal rights improved. The protective attitude of the courts in the US to sexual favouritism is generally more enlightened than the approach adopted by the courts and employment tribunals in the UK and a lesson could be learned from this. It could be that statutory recognition of sexual favouritism as a specific form of discrimination would assist UK judicial bodies faced with these claims although it might be tricky to arrive at a satisfactory definition of the unlawful behaviour. The EEOC guidelines in the United States might be a suitable starting point. There is no sign that in the short to medium term the UK Government plans to legislate in this area or indeed that they recognise this as an issue. The Equality and Human Rights Commission recently reviewed the law of sexual harassment and set out ten recommendations in a call to the Government to take action (EHRC, 2018). Unfortunately, they did not specifically cover this type of behaviour. Some of these recommendations have also been made by the Women and Equalities Committee of the House of Commons. They recently undertook a full inquiry into sexual harassment in the workplace over a period of six months. However, they did not specifically cover this issue (Women and Equalities Committee of the House of Commons, 2018). Many of the recommendations may impact favorably on victims in this context, however, neither report offers directly to help them. Despite this, this article has shown that changing the current law to better protect the various types of victims of sexual favouritism and the fallout from discontinued sexual relations in the workplace is urgent and necessary. If, and when, this happens employers will need to take this matter more seriously and be proactive in dealing with it, in order to avoid liability.



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